

1511143 (Migration) [2016] AATA 4099 (1 July 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Hnin Wint Mon

CASE NUMBER: 1511143

DIBP REFERENCE(S): BCC2014/3471567

MEMBER: Suzanne Carlton

DATE: 1 July 2016

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A.

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Statement made on 1 July 2016 at 9:35 am

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 5 August 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 16 December 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy r.2.03A because the parties had not evidenced that they had been in a genuine and continuing de facto relationship for at least 12 months prior to the application.
4. The applicant was represented in relation to the review by her registered migration agent.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The applicant is a 27 year old Burmese woman who came to Australia as a student in 2009. After holding a series of student visa, she was granted a subclass 485 visa valid until 23 March 2015. On 16 December 2014, this application was made.
7. The sponsor is a 30 year old Irish national, who was granted permanent residency in Australia in 2012.
8. The issue in the present case is whether and when the parties commenced a de facto relationship and whether that relationship is continuing. If the parties were not in a de facto relationship for at least 12 months prior to the lodgement of the application, a further issue for consideration is whether there are compelling and compassionate circumstances for the grant of the visa, notwithstanding that the applicant did not meet r.2.03A.

SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian permanent resident.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

10. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and

continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

11. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
12. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint accounts and the extent to which the parties pool financial resources and share of day-to-day household expenses.
13. The Tribunal has had regard to the evidence provided relating to the nature of the parties' household, including any sharing of housework.
14. The Tribunal has had regard to the evidence provided relating to the social aspects of the relationship, including that the parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
15. The Tribunal has had regard to the evidence provided relating to the nature of persons' commitment to each other, including the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
16. The Tribunal is satisfied, based on the extensive evidence presented to it upon review, as well as the earlier evidence provided to the Department, that the parties have evidenced a mutual commitment to a shared life to the exclusion of others. They have evidenced that they live together in a genuine and continuing relationship.
17. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application and decision.
18. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

19. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
20. The parties were both at least 18 at the time of application. However, the delegate was not satisfied on the evidence before him that the relationship had been of a de facto nature for at least 12 months prior to the lodgement of the application.
21. The Tribunal acknowledges that the evidence with respect to this is limited and is similarly not satisfied that the parties were in a de facto relationship for the requisite time period. Nevertheless, the Tribunal has been provided with documentary evidence that satisfies the

Tribunal that there are compelling and compassionate circumstances for the grant of the visa. These include, but are not limited to the fact that the parties' first child is due to be born later this month.

22. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
23. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

24. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

Suzanne Carlton
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).